United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2278

ORIGINAL

To be argued by
DANIEL RIESEL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA ex rel. JEFFREY FOSTER,

Petitioner-Appellant,

- against -

JAMES R. SCHLESINGER, Secretary of Defense, JOHN W. WARNER, Secretary of the Navy, and ADMIRAL JOHN N. SHAFFER, Commandant, Third Naval District, New York,

Respondents-Appellees.

BRIEF FOR PETITIONER-APPELLANT

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September Term 1974

Docket No. 74-2279

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-against-

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BRIEF OF PETITIONER-APPELLANT

STATEMENT OF THE ISSUES

I.

Is there a basis in fact for the Chief of Naval Personnel's decision that Appellant's sincere conscientious objec-

tion crystallized prior to induction when the testimony relied on unequivocally indicates that only opposition to war and violence existed prior to enrollment and that these thoughts crystallized after induction?

II.

Was error committed by the Navy when Appellant's Commanding Officer failed to submit a report, recommendations and reasons with respect to the Appellant's application for discharge as he was required to do by Naval Regulations?

III.

Did the Navy fail to follow its own regulations by denying an acknowledged, conscientious objector a discharge on the ground that his beliefs had become fixed prior to enrollment when he could not have qualified as such at the time of his enrollment?

STATEMENT OF THE CASE

This is an appeal from the order of the Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, dismissing a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. §2241(c)(1)(3) in which

petitioner-appellant seeks a discharge from the United States Naval Reserve on the grounds that he is a conscientious objector within the meaning of the Naval Regulation and is being unlawfully detained by the respondents-appellees.

STATEMENT OF THE FACTS

(a) Dr. Foster's Background.

Dr. Jeffrey Foster, the Appellant, is a medical doctor and psychiatrist. On February 4, 1966, he enrolled in a Naval Reserve Program for medical students, known as "Ensign 1915". At the time of his enrollment, he was attending Columbia University. Subsequently in September, 1966, he entered New York Medical College and began his medical education. The Naval Reserve records indicate that he began his inactive duty in the Naval Reserve as an Ensign on September 8, 1966. (R-11)*

From time to time Dr. Foster applied for continuation of his deferment and received promotions to his present grade of lieutenant in the Naval Reserves. (108a).

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* References to "R" are to the record docketed with this Court on October 23, 1974, and references to "a" are to the Joint Appendix filed with this Court.

Lieutenant Foster in 1970 participated in the successor program to the Ensign 1915 program, the Berry Plan [50 U.S.C. app. 456(a)(1)]. The Berry Plan permitted Dr. Foster to complete his psychiatric residency. Dr. Foster has never been on active duty, accepted pay, worn a Naval uniform or participated in any of the activities normally associated with commissioned service in the United States Navy. He has been, for all intents and purposes, a civilian. (93a). In the late summer of 1973, Dr. Foster, who had for many years had a generalized feeling of abhorrence of war, violence and crime, received a notice from Captain Terone of the United States Navy stating that if he did not submit an application for an immediate deferment, he would be called to active duty within ten days. (23a)

At that time Dr. Foster was treating a young woman who was dying of leukemia. The threat of imminent activation, coupled with the tragic dying of the young leukemia patient, forced him for the first time to critically analyze the significance of his own participation in the armed forces. (26a). In the month of August, 1973, Dr. Foster underwent an abrupt and searing review of his moral position, and in September, 1973, after returning from a few weeks vacation, he tendered his resignation from the United States Naval Reserve. (24a). In tendering his resignation, he indicated that:

> "All war to me is a tragic failure of rational and peaceful communicative attempts at solving conflict. I can never condone it in either overt or subtly covert form, including that of being a noncombative participant.
>
> I do not believe that any professional act of mine were I to be on active naval duty, could be dissociated from direct or indirect support of the Naval war component of the United States Government Armed Forces. My objection to all war is such that I could not function as a Naval psychiatrist or physician. For these reasons and for the good of the Naval Service I respectfully request that my resignation from the Naval Reserve be approved as soon as possible." (24a).

There followed considerable administrative confusion, which the District Court correctly concluded was in no way relevant to these proceedings. (118a). Finally in March, 1974, Dr. Foster's Commanding Officer, the Commandant of the Third Naval District, forwarded to Dr. Foster a letter from the Bureau of Naval Personnel which clarified his position. (8a). Immediately thereafter on March 20, 1974, Dr. Foster submitted a formal application for discharge from the United States Reserve on the grounds of conscientious objection to participation in war of any form. (26a-41a). That application contained a description of his beliefs. (28a-30a). It also included a detailed analysis of the development of those beliefs (30a-36a), and an explicit identification of precisely when his long held views regarding war and violence crystallized and matured into conscientious objection. (36a-37a).

Dr. Foster's description of his beliefs, based on natural law, contains the following statements:

> "It is my belief that man has evolved - and continues to evolve - towards a unique position and function on this planet and in this universe. This evolution is based upon natural laws which govern the workings and evolution of atomic, molecular, microscopic and cosmic process; and it proceeds in accord with general principles of adaptive functioning operating over billions of years.
>
> . . . I believe that among such living systems -- of which man is the only representative known -- there is an ethical code which derives from this awareness of the remarkable biologic uniqueness we have been endowed with . . . . To retard or destroy our individual or combined functional integrity and potential capacities is completely wrong! It is a total abberation of the biologic value and momentum (28a) which extends to and through us after eons of evolutionary time. Certainly the inherent violence and destruction of war between men is the most extreme violation of this basic moral directive and must always be opposed!
>
> The physical and mental trauma of war is totally inconsistent with my beliefs and their manifestations in my role as a physician . . . .
>
> Also as a psychiatrist I particularly have come to see that war and violence is not only morally wrong but also senseless and illogical." (29a)

Of greater significance to the central issue of this appeal is Dr. Foster's detailed account of the development of these beliefs as he passed through medical school, internship and residency:

" "I am not sure if my early religious training has influenced the development of my beliefs ....

I do know, however, that the beginning (30a) of my beliefs concerning man's special biologic endowment and momentum can be traced to the year prior to my entry into medical school ..." (31a).

"However, during my medical training these more abstract perceptions were increasingly anchored to the concrete realities of learning basic medicine, as well as living in a nation at war in Vietnam." (32a)

"It was especially during my internship that the difficulty of reversing illness became clear. For the first time I had direct primary responsibility for my patients. Now it was my patient who died despite all our efforts; ... this personal involvement and responsibility converted my medical teachings and perceptions as a student into a personal experience of conviction. And likewise my self-taught perspective of man's evolutionary momentum were gradually being translated to a deeper level of conviction as personal involvement against the Vietnam War required my increased political responsibility." (33a).

. . .

"As I began my psychiatric residency I now focused on a different aspect of medicine; the treatment of the emotional, intellectual and behavioral manifestations of mental illness . . . This training in distinguishing the irrational, trying to understand violence, and appreciating the disruptive effects of aggression has deepened my conviction that war among nations is not very different from the violence of individuals -- except that on a national level the destructiveness is infinitely greater." (34a)

> "Finally, especially during the last year of my psychiatric training, I had many occasions as a consultant on two wards (one for adults, the other for adolescents) to vividly appreciate the emotional reprecussions of serious illness and dying on the patient and his or her close ones." (35a-36a)

Dr. Foster's description of the point of time that his thoughts crystallized into conscientious objection was stated as follows:

> "My views solidified in the late summer of 1973. This occurred due to the cumulative effects of many factors described above -- with the particular coincidence of two events at this time. First, I received an unexpected certified letter from the Navy on August 8th from a Capt. Trone (B UMED--3174--mm; August 3, 1973) requiring me to submit a Berry Plan deferment request within 10 days or be called to immediate active service. I had no idea what "request" the Captain was talking about -- and was shocked at the totally unexpected possibility of immediate active duty! I hurriedly wrote the Captain that very day to advise him that during all my residency years I had never been asked to submit any such request form and to ask that he provide me with this form. However, the idea of active military duty now persisted in my thoughts for the very first time in the seven years since I had joined the Ensign 1915 Program. (36a)
>
> Second, the Captain's letter came at a time just before my vacation which was an extremely difficult period for the young woman I was treating who was dying of leukemia (see pages 10-12 of the dying patient case presentation) and about whom I was quite concerned. During my vacation I received letters from her that revealed her terrible emotional and physical distress although she had just left the hospital. Even her handwriting had deteriorated! My concerns about her welfare, coupled with the sudden

> threat of being called to active duty, gave me much to consider over that vacation regarding my views on actual military service and what course of action I should take. On September 18, 1973, I sent a letter of resignation from the U.S. Naval Reserve to the Commandant of the Third Naval District and a copy of this letter to Captain Trone . . .. The reasons cited for tendering my resignation were those of conscientious objection to all war in all forms. I have considered myself a conscientious objector since that time." (37a)

Accompanying the application for discharge were a series of reference letters from friends, relatives, colleagues and Dr. Foster's own psychiatrist of some 14 years. (42-49a) Three of those letters indicate with precision the time of and reasons for maturation of his principles. (i) The letter of a lawyer, Kenneth Gordon, stated:

> "His acute concern for a young patient dying of leukemia was more than just grief for her fate; it was a wrenching sorrow and, perhaps, even anger and frustration at the impotence of medicine to save her life. I shared his thoughts all during that difficult summer as we jogged together each morning and later, after the girl's death, as we vacationed together in Dr. Foster's summer home. His feelings about death and the wasting of a young, unfulfilled life struck me quite forcefully. I found it then, as I do now, quite consistent with his beliefs as to the waste and horror of all forms of war.
>
> At the same time that Dr. Foster's thoughts were occupied with the dying patient, he was faced with the dilemma of his prospective Navy service. His decision to resign from the Naval Reserve as a conscientious objector was not, I can assure you, taken lightly and without reflection. Dr. Foster

> discussed his dilemma with my wife and I during the late summer of 1973 when we vacationed together with our families. The sincerity, depth and genuineness of his beliefs led us to conclude that his resignation was both logically consistent with beliefs and the only solution to his feelings of abhorrence of war. . . ." (44-45a)

(ii) The letter of Dr. Foster's wife, Rose Marie A. Foster, which stated:

> "The summer of 1973 proved to be a crucial one for my husband. During this time Jeff was deeply involved in the psychotherapy of a 20 year old girl who was dying of leukemia - an experience which has further strengthened his respect for the human life. Also during this summer, my husband received a certified letter from the Navy in reference to his deferment. . . . At this point my husband was faced with the imminent consideration of active duty in the Navy. In the quiet of the country home we had rented that summer, Jeff gave deep thought to actual personal involvement in the military.. . . After much deliberation and long sessions of discussion with myself as well as close friends, my husband resolved that he just could not participate in any form with an organization whose main objectives are war activity and the killing of human life ....We have lived and agonized together over the long years of the Vietnam War, his years of medical training, the growth of his abhorrence for all war and the ultimate evolution of his beliefs into those of a conscientious objector...." (42-43a)

(iii) Perhaps, most importantly, the letter of Dr. Joel Markowitz, which stated:

> "From the time I first knew him, he abhorred violence and aggression. He has always demonstrated a blanket negative response to war, crime and other destructive activities.

> Over the past several years his beliefs have strengthened in this direction, particularly as he discussed the horrors of the war in Viet Nam. His investment in becoming a doctor, in healing people, correspondingly increased.
>
> I would say that his anti-war attitudes crystallized in the summer of 1973 and I would definitely consider them consistent with the classification of conscientious objector." (Emphasis supplied) (49a)*

(b) The Proceedings Before The Navy.

Consistent with the requirements of 32 C.F.R. 730.18**, on April 22, 1974, the petitioner was interviewed by a psychiatrist, who fixed the summer of 1973 as the point of time when Dr. Foster's objections to military service became fixed. (50a). On the same date, also consistent with Naval Regulation, the petitioner was interviewed by a Naval Chaplain, Commander A. J. Otto. The Chaplain's brief conclusion following the interview was that "Doctor Foster's claim of conscientious objection is based on a rare personal moral code, which even he has great trouble in defining." (52a)***.

---

* Dr. Markowitz's views regarding crystallization are of extreme significance, since it was his subsequent testimony regarding the nature of Dr. Foster's beliefs and the length of time that Dr. Foster held those beliefs which the Chief of Naval Personnel focused on as the sole basis for denying Dr. Foster's application for discharge.

** This Regulation is designated within the Naval administrative system as "BUPERSMAN 1860120", and some references appear in the cases to this Regulation utilizing its internal designation. However, for the purposes of this Brief, we shall refer to it as it appears in the Code of Federal Regulations.

*** It is apparent from the lengthy summary of interviews prepared by Dr. Foster and transmitted to the Commandant and then to the Chief of Naval Personnel that there was a significant clash between the Naval psychiatrist and Chaplain on the one hand and Dr. Foster on the other. (53a).

The interview process culminated in a hearing before a Naval Investigating Officer. (58-94a).

That Investigating Officer was Commander Joseph Sweeney, a lawyer, Professor of Law at Fordham University Law School and Commanding Officer of Naval Reserve Law Company for this district (59a). Commander Sweeney took evidence from Dr. Foster and his psychiatrist, Dr. Markowitz, at a hearing held on May 31, 1974.

Dr. Markowitz testified that he had practiced psychiatry for twenty years and had been Dr. Foster's personal psychiatrist for the 14 years prior to the hearing (60-61a).

Dr. Markowitz testified that Appellant came to him initially because of the trouble he was having due to the brutality and uncontrollable violence of his father (62a). Dr. Markowitz further testified that Dr. Foster had "divided reality into two categories: one a violent, evil category, which is, of course, his father's, and the other a non-violent, good category, to which he decided to dedicate his life -- which is the reason also for his medical school, his psychiatry." (63a).

Dr. Markowitz then testified that his patient initially had not adequately evaluated his beliefs with respect to his participation in the Navy:

> "Now, I think that Dr. Foster got into trouble in his application as a conscientious objector partly because when he first heard that he had to go into the Navy he used a device which is familiar to psychiatrists called denial. I remember he came to my office at that time and simply mentioned to me that there was no problem, he was supposed to go in the Navy but there was some alternative, and I don't think he ever considered himself in the Navy from this time on and I never heard of it from that time on until this very time. He just pushed it out of his mind." (63a-64a).

Thereafter, Dr. Markowitz observed that Foster had for a long time held generalized views opposing war and violence. "He (Dr. Foster) spoke of war, violence, aggression being bad, evil." (64a). Dr. Markowitz surmises that these views, although expressed in moral and ethical terms, are linked to his patient's psychodynamic patterns. (65a-67a).

Dr. Markowitz then observed that Dr. Foster "hasn't in any way modified his non-violent attitudes." (68a). However, Dr. Markowitz was careful to document how Dr. Foster had changed through the years.

> "I am concerned about Dr. Foster, frankly because he has done so well. He has become one of the most conscientious doctors and psychiatrists I have come across. He is one of the hardest working people. He is a saint to his patients. He is a sensitive, understanding, sympathetic father and husband. And given sane leeway in choosing his area of functioning he will become a very valuable contributing member to society. I would guess he would spend his life doing constructive non-violent things, helping people." (68a).

Dr. Markowitz then observed that his patient had finally reached a drastic conclusion with respect to his position with the Navy:

> "He has made up his mind he cannot go into the service and so he is thinking of this other possibility, that he might get jail. I don't know that he would survive jail very well -- or at all. And it would be a terrible loss to his family and, of course, to society too. It would be a kind of irony if this young man, who has done so well and who is so opposed to destructiveness, were put into the Navy, which would, I think, then represent in his mind a very aggressive father surrogate, into a dilemma of having to decide between abandoning his moral/ethical way of life and going to jail -- which I don't think he is constitutionally psychiatrically capable of dealing with ...." (69a)

(c) Conclusive Evidence of Late Crystallization

Commander Sweeney obviously aware of the importance of late crystallization, elicited specific answers from Dr. Markowitz on this point:

> "Q. Doctor, in the 14 years that Dr. Foster has been your patient you have mentioned that he had moral and ethical beliefs against violence in 1960. What I am concerned with are the moral and ethical beliefs that he has subscribed to after September, 1973 .... And I am anxious to determine whether the statements made of beliefs after September, 1973, are consistent with feelings that you have noted since you began to treat him in 1960...." (70a) (emphasis supplied)

Dr. Markowitz responded by explaining how Dr. Foster's present beliefs were consistent with his past beliefs. (71a). Commander Sweeney then attempted to elicit from Dr. Markowitz a distinction between the petitioner's long held general and abstract views of violence with his recent views. He asked:

> "Q. Did you observe a change in quality or quantity of the nature of this belief between 1960 and September, 1973? (71a).

Dr. Markowitz, at some length, explained that Dr. Foster had reached a point where his thought process took a significant turn.

> "A. I would say that since he has -- I have forgotten if it was in September or when, but since he suddenly had to face this situation his denial of the Navy situation has been broken. . . ." (71a-72a).

> "Since this sudden confrontation he has been very aware of the presence of the Navy, of the existence of the Navy, and all of a sudden he seems to be saying to me all the time, 'This is unthinkable. I can't be in a military organization. I will have nothing to do with military organizations.' He never spoke of military organizations before except in a very distant and abstract way." (72a).

> "So it is certainly as if something has crystallized in him. It is as if where there was denial before there is now an excessive preoccupation. It is as if he has never considered himself in any imminent military situation before this time." (72a-73a).

In addition, Dr. Foster's counsel questioned Dr. Markowitz regarding the date of crystallization of Dr. Foster's beliefs:

> "Q. ... Is it your view that his belief which he has always held as far as you know crystallized in a way in the period when he knew that he had to be activated? Is that your testimony?
>
> A. Yes.
>
> Q. Is that the event which you find pertinent?
>
> A. That's certainly true. The war had always been some peripheral thing to him, however horrible. All of a sudden he was in the middle of it, you could say, and he was absolute in his attitude that anything military was unacceptable." (75a-76a).

After the examination of Dr. Markowitz, Commander Sweeney examined Dr. Foster. That examination reflects the Commander's training as an attorney and his familiarity with the issue of crystallization. (80a-90a). Commander Sweeney began the examination of Dr. Foster with questions directed to ascertain how Dr. Foster's beliefs had developed and changed. (81a). Dr. Foster stated that his initial concepts began to take shape and form prior to his entry into medical school. After Dr. Foster described these beliefs, the Investigating Officer inquired:

> "Q. Dr. Foster: you mentioned Prof. Wald's article and statements as one source of an understanding of life similar to yours.

> I wonder if you could list for us other sources of belief that have animated your present rejection of violence in all forms . . . . " (Emphasis supplied) (85a).

In response to that question, Dr. Foster listed his experiences that he had encountered during his medical education, such as his brain research work with a medical school professor, his research in the Rockefeller University Laboratory and conversations with anti-war scientists. (85a-86a).

When the Investigating Officer probed with respect to the development of his beliefs, Dr. Foster emphasized that although his early basic concepts had been set out in a 400-page paper written prior to entry into medical school, it was the experiences during his medical education that developed into conscientious objection. (86a). Thus Dr. Foster stated that in addition to his earlier thoughts, the "scientists that I collaborated with, the medical school professors and fellow students, who had very strong views against the war ... and particularly in view of my psychiatric training and experiences in dealing with violence" contributed to his conscientious objection. (86a-87a). Thereafter the Investigating Officer focused on the point when Dr. Foster first dealt with the death of patients and Dr. Foster emphasized the importance of his treatment of the fatally afflicted leukemia patient. (87a-90a).

(d) Findings of the Hearing Officer.

Following the hearing on June 21, 1974, Commander Sweeney reported the results of his investigation to the Commandant, Third Naval District. He indicated that, consistent with Regulation, he had reviewed the petitioner's file, reviewed the applicable Regulation and consulted applicable legal authorities.*

Commander Sweeney initially observed that Dr. Foster really had no meaningful contact with the Navy.

> "At the outset it should be noted that subject officer's connection with the naval service has been minimal, he having been commissioned while a medical student under the Berry Plan in 1966 and without ever serving on active duty." (93a-94a).

The Investigating Officer's report then notes that Dr. Markowitz's testimony dealt with the origins and development of Dr. Foster's beliefs:

> "At the Hearing, Dr. Joel Markowitz, M.D., a psychiatrist for twenty years and who has been consulted by subject officer for the past fourteen years, testified. Dr. Markowitz's views on conscientious objection to military service are opposite from those of subject officer. Dr. Markowitz testified concerning the

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* Citing: "United States v. Seeger, 386 U.S. 246; Welsh v. United States, 398 U.S. 333; Gillette v. United States, 401 U.S. 437; Fein v. SSB 7, 405 U.S. 365; and the following law review articles: Field, Problems of Proof in Conscientious Objection Cases, and Zillman In Service Conscientious Objection: Courts, Boards and the Basis in Fact. (93a).

development of subject officer's moral and ethical beliefs and the origin of such beliefs. (See Record, pp. 3-23)...."

Commander Sweeney concluded:

"FACT:
It is considered that the claim of subject officer, as established by the totality of the record and by the Hearing in the case, has not been made frivolously, and that the minimum objective standards now established by law and regulation for conscientious objector discharge have been met.

OPINION:
By reason of the entire record and by reason of observation of the personal testimony and demeanor of Lt. Foster the undersigned is persuaded that Lt. Foster sincerely holds ethical beliefs which require him to refrain from participation in any war at any time.

RECOMMENDATION:
It is recommended that Lt. Foster be discharged from the naval service by reason of conscientious objection." (93a-94a).

(e) Commanding Officer's Failure.

The applicable Naval Regulation, 32 C.F.R. §730.18(k) specifically provides that the applicant's commanding officer is required to review his record. If it is not complete, he may return it to the Investigating Officer. When the record is complete, the Commanding Officer is required to make a recommendation with

respect to the application for discharge and forward it to the Chief of Naval Personnel. The Commandant, Third Naval District, is Dr. Foster's commanding officer within the meaning of the Regulation. However, as the Government conceded below, that officer failed to make the required recommendation*, and only forwarded the record to the Chief of Naval Personnel. (96a).

(f) Denial by Chief of Naval Personnel.

By letter dated July 11, 1974, and received by the petitioner on July 13, 1974, (95a) the Chief of Naval Personnel denied the petitioner's application for discharge as a conscientious objector. No specific findings of fact were made. In conclusory fashion, the Chief of Naval Personnel, ignoring the uncontradicted testimony of Dr. Markowitz and the record as a whole, indicated:

> "2. Your application with all its supportive documents has been afforded careful and complete review. On the basis of this review it is apparent from the testimony of your psychiatrist that prior to entry into the Navy you were opposed to war and killing. Your psychiatrist stated that your non-violent attitudes haven't in any way been modified within the past 14 years. While your concerns and reservations may now be

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* The concession is set out at pp.23-24 of the Government's Brief before the District Court. The Government argued that the Regulation need not be followed as the Commanding Officer did not actually know the applicant.

> stronger there is nothing to indicate that your present beliefs are in substance and foundation any different than those you held before you accepted your commission. While the Chief of Naval Personnel recognizes your sincere desire for discharge, your application and the attendant correspondence are not considered supportive of your request for discharge as a conscientious objector." (95a).

Dr. Foster's orders required him to report for active duty on July 15, 1974. (57a).

(g) Proceedings in the District Court.

Dr. Foster filed a Writ of Habeas Corpus and brought on a motion for a preliminary injunction by order to show cause on July 15, 1974, and the Government consented to the entry of a temporary restraining order. Oral argument was heard on July 25, 1974, and Judge Duffy dismissed the Writ of Habeas Corpus on September 13, 1974.* (119a).

The District Court observed that "there is no dispute as to the sincerity of petitioner's beliefs, but only as to the time of their crystallization." (122a). The Court concluded its opinion with the finding that the sincerity of Dr. Foster's conscientious objection "has never been challenged by the Chief of Naval Personnel; rather, it is the length of its duration which

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* The parties have entered into a stipulation staying Dr. Foster's active duty date pending this appeal.

defeats his claim." (123a).

Thus proceeding from the basis that the petitioner was a conceded sincere conscientious objector, the Court defined the issue before it as:

> "[W]hether or not there is some evidence in the record which would support a finding that petitioner's conscientious objection crystallized prior to his enrolling in the Ensign 1915 Program since it was this finding on which the Chief of Naval Personnel based his denial of a discharge to Dr. Foster." (121a)

Judge Duffy noted that Dr. Foster argued that his application for discharge was "prompted by the crystallization in the summer of 1973 of his anti-military beliefs". (119a). The Court then correctly stated, "[I]t is petitioner's contention that the process of crystallization was triggered by the concurrence of the Naval notification of his impending active service and his treatment of a young girl dying of leukemia." (Ibid.)

However, the District Court, relying on Dr. Foster's early abhorrence of war and violence, found that there was evidence as to the pre-enrollment crystallization of Dr. Foster's thoughts:

> "There is ample evidence of petitioner's thinking from the time before he entered the Naval Reserve up until the present . . . . There is evidence that Dr. Foster has long objected to violence . . . . Both Dr. Foster and his psychiatrist

> spoke to Dr. Foster's objection to the Vietnam War. Both pointed to a clipping from an article by George Wald in March, 1966, which petitioner had saved as reflective of the development of his personal phylosophy of man's role in the universe." (121a).

Apparently, the key to the District Court's decision is its misunderstanding of the technical term used by Dr. Markowitz. Thus, the Court reasons that "much of the evidence in support of petitioner's claim of late crystallization turns on the breakdown of his psychological defense of 'denial' of his obligation to the military. A similar argument failed in Nurnberg,* where petitioner 'had the unrealistic hope that he might not be called.'" (122a).

Dr. Foster's contention that his generalized abhorrence of war and violence correspond to successful petitioners in Goodwin v. Laird, 317 F. Supp. 863 (N.D. Cal. 1970), and in McGehee v. McKaney, 312 F. Supp. 1372 (N. Md. 1969) was summarily dismissed by Judge Duffy, who ruled:

> "Clearly one's deep felt beliefs sufficient to be a true conscientious objector must begin to take shape, or at least spring from experiences which have occurred, prior to service in the Armed Forces even if such beliefs do not crystallize until thereafter. However, Dr. Foster's beliefs would seem to have progressed to a far more developed state than those of the petitioners in Goodwin and McGehee." (123a).

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* Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973).

Finally, the court rejected Foster's procedural argument that the Chief of Naval Personnel should not have reversed the finding of the Investigating Officer reasoning that the Hearing Officer's opinion with respect to Dr. Foster's sincerity was not crucial because only the duration of his conscientious objector beliefs were an issue.

This appeal followed, and Dr. Foster's motion for a stay pending appeal was granted by Judge Duffy on September 24, 1974.*

APPLICABLE REGULATIONS

Title 32, CODE OF FEDERAL REGULATIONS:

Chapter VI -- Department of the Navy

Part 730 -- Administrative Discharge and Related Matters Concerning Separations from the Naval Service.

§ 730.18 Conscientious Objectors.

(a) Conscientious objectors are persons who by reason of religious training and belief have a firm, fixed, and sincere objection to participation in war in any form or the bearing of arms. No vested right exists for any member to be discharged from the Regular Navy or Naval Reserve at his own request, even for conscientious objection, before the expiration of his term of service,

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* A substitution of counsel was filed thereafter.

whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of an obligated term of service will be effected only with the approval of the Chief of Naval Personnel.

(b) After entering naval service, a request for discharge based solely on conscientious objection which existed but was not claimed prior to induction or enlistment shall not be considered if such beliefs satisfied the requirement for classification as a conscientious objector pursuant to section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456) and related provisions of law, and the member failed to request classification as a conscientious objector by the Selective Service System (SSS), or if his request for classification as a conscientious objector before entering military service was denied on the merits by the SSS and his present request for classification as a conscientious objector is based on essentially the same grounds, or supported by essentially the same evidence, as the request which was denied by the SSS. Claims growing out of the experiences prior to entering military service but which did not become fixed until after entry into the service will be considered.

. . .

(j) The applicant's commanding officer shall appoint an investigating officer in the grade of lieutenant commander or above, not necessarily a member of the applicant's command, to investigate the applicant's claim. If a qualified officer of this grade is not available, the commanding officer may appoint

an officer of the grade of lieutenant who, in the opinion of the commanding officer, is well-qualified by reason of age, education, training, experience, and length of service. The officer so appointed shall not be in the immediate chain of command of the applicant and, if the applicant is a commissioned officer, shall be senior in both temporary and permanent grades to the applicant.

. . .

(9) The investigating officer's report shall include his recommendations for disposition of the case and his reasons therefor. Subject to the provision that an applicant claiming 1-0 status will not be granted 1-A-0 status as a compromise, the actions recommended shall be limited to denial of any classification as a conscientious objector, classification as 1-A-0 conscientious objector, or classification as 1-0 conscientious objector.

(10) The investigating officer's report along with the member's application, all interviews with chaplains or doctors, the applicant's statement concerning Veterans' Administration benefits, evidence received as a result of the investigating officer's hearing, and any other items submitted by the applicant in support of his case will constitute the record. The investigating officer's conclusions and recommended disposition will be based on the entire record and not merely on the evidence produced at the hearing. A copy of the record will be furnished to the applicant at the time it is forwarded to his commanding officer. The applicant shall be informed that he has the right to submit a rebuttal within 5 working days after receiving his copy of the record.

The investigating officer's report shall include the following dated statement signed by the applicant:

. . .

(k) The commanding officer shall review the record of the case for completeness and may return it to the investigating officer for further investigation. When the record is complete, the commanding officer shall forward it with his personal recommendations and the reasons therefor to the Chief of Naval Personnel for final action. If the applicant's request is for assignment to noncombatant duties, the commanding officer's recommendation shall include a statement concerning whether the applicant should be assigned to noncombatant duties or training and, if so, whether he is qualified and desires assignment to the Hospital Corps or, in the case of officers, to the Medical Corps, Medical Service Corps, Dental Corps, or Nurse Corps. If the member does not desire such duties or training, or is not qualified, the commanding officer shall state whether his services can be utilized on board his present duty station if assigned a limited duty designator L-8. The commanding officer's forwarding endorsement shall include the applicant's rebuttal to the record, if any.

ARGUMENT

I.

THERE WAS NO BASIS IN FACT FOR THE CHIEF OF NAVAL PERSONNEL'S DECISION THAT DR. FOSTER'S SINCERE CONSCIENTIOUS OBJECTOR BELIEFS CRYSTALLIZED PRIOR TO ENROLLMENT IN THE NAVAL RESERVES.

(a) Conscientious Objectors Exempted From Service.

Although this country has had a strong tradition of exempting conscientious objectors from military service that predates our independance, it has only been since 1962 that the Department of Defense instituted procedures for the discharge of military personnel for reasons of conscientious objection. Hammond. v. Lenfest, 398 F.2d 705, 708 (2d Cir. 1968).

In furtherance of that tradition, Department of Defense regulations provide, "insofar as may be consistent with the effectiveness and efficiency of the military services, a request for classification as a conscientious objector and relief . . . from military duties . . . will be approved to the extent practicable and equitable . . . ." 32 C.F.R. § 75.4(a). The Department of the Navy has promulgated regulations to implement this policy. See 32 C.F.R. § 730.18*.

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* Similar provisions appear in the regulations of other services.

(b) Dr. Foster's Application for Discharge.

Jeffrey Foster like many other medical students enrolled in a Naval Reserve program as a commissioned officer in 1966. That program eventually allowed Foster to finish medical school, internship and residency. During this period he had no meaningful contact with the Navy or its reserve components.* Naval Reserve records may have carried him as a reserve officer, but for all practical purposes, he was a medical student and a young doctor learning his profession.

During this long period of professional education, Dr. Foster's belief in "man's special biologic endowment and momentum" matured and in August, 1973, the threat of imminent active duty, coinciding with his treatment of a young woman fatally afflicted by leukemia, shocked or crystallized his views into conscientious objection to war in all forms.

The Department of the Navy does not deny that Dr. Foster is a conscientious objector who meets the criteria for discharge, i.e. (1) opposition to participation in war in any form, (ii) deeply held moral and ethical views, and (iii) sincerity.**

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* See the certified copy of Official Documents and Officer Record, a designated document on the record on appeal, and the Investigating Officer's conclusion. (93a).

** Clay v. United States, 403 U.S. 698 (1971).

Indeed, as the District Court correctly noted, Dr. Foster's sincerity has never been challenged by the Chief of Naval Personnel. Nevertheless, the Chief of Naval Personnel concluded that Dr. Foster's application should be denied stating it was "apparent from the testimony of your psychiatrist that prior to entry into the Navy you were opposed to war and killing. Your psychiatrist stated that your non-violent attitudes haven't in any way been modified within the past 14 years." (95a). Thus, the Chief of Naval Personnel relief upon that section of the Naval Regulation which prohibits favorable consideration of an application for discharge based on conscientious objection, "which existed but was not claimed prior to induction or enlistment . . . if such beliefs satisfied the requirement for classification as a conscientious objector pursuant to 6(j) of the Universal Military Training and Service Act . . . ." 32 C.F.R. § 730.18(b).

The authorities cited herein hold that a generalized opposition to war and killing does not amount to conscientious objection. Moreover, the Naval Regulation quoted takes cognizance that such attitudes are not tantamount to conscientious objection. Thus, the Department of Defense and Naval Regulations provide:

> "Claims growing out of experiences prior to entering military service but which did not become fixed until after entry into the service will be considered." 32 C.F.R. § 730.18(b).

This section of paragraph (b) of the Regulation has given rise to intensive litigation in this and other circuits over the issue of whether a generalized and abstract opposition to violence and war crystallized into a specific decision to place duty to conscience ovove duty to the state before or after entry into the armed forces. Nurnberg v. Froehlke, 489 F.2d 843 (2nd Cir. 1973); Aron v. Laird, 358 F. Supp. 1170 (D.N.C. 1973) affirmed without opinion, 487 F.2d 1397 (4th Cir. 1973); Bolen v. Laird, 443 F.2d 457 (2nd Cir. 1971); Ward v. Volpe, 484 F.2d 1230 (9th Cir. 1973); Polsky v. Wetherill, 455 F.2d 960 (10th Cir. 1972); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971); Grubb v. Birdson, 452 F.2d 516 (6th Cir. 1971); Ames v. Laird, 450 F.2d 314 (9th Cir. 1971); Morison v. Larsen, 446 F.2d 250 (9th Cir. 1971); United States ex rel. Healy v. Beatty, 424 F.2d 299 (5th Cir. 1970); United States ex rel. Brown v. Resor, 429 F.2d 1340 (10th Cir. 1970). See also Chamoy v. Schlesinger, 371 F. Supp. 685 (D. Hawaii 1974); Goodwin v. Laird, 317 F. Supp. 863 (N.D. Cal. 1970); Rautenstrauch v. Secretary of Defense, 313 F. Supp. 170 (W.D. Tex. 1970); Bouthilette v. Commanding Officer, 318 F. Supp. 1143 (D.R.I. 1970).

In each of these cases, the court, in deciding whether an admitted conscientious objector could be retained in the armed forces, dealt with the issue whether his principles had matured prior to his entry. The courts have sustained the

military's action only where there has been a basis in fact for finding that the serviceman was actually insincere. Compare Nurnberg v. Froehlke, supra, with Polsky v. Wetherill, supra. In the instant case the naval authorities unequivocally agree that Dr. Foster is sincere in his convictions.

As indicated, these cases teach that a general religious or ethical belief that war and violence are bad does not render an individual a conscientious objector within the meaning of the Universal Military Training and Service Act. The Armed Forces' inability to delineate between these general beliefs and conscientious objection has undoubtedly been reinforced by applicants' tendency to document their early anti-war beliefs, for as the Tenth Circuit recently pointed out, "[A]n applicant's sincerity would be suspect if he had no religious or non-violent tendency prior to entering the service". Polsky v. Wetherill, supra, at 962. Of course, the inability to distinguish between general ethical and moral beliefs and conscientious objection renders the military's analysis of crystallization meaningless. Accordingly, we initially turn to the cases which delineate between ethical beliefs against war and a conscientious objection to participation in war.

(c) Ethical and Moral Beliefs.

As indicated, it is not contended by the Appellant that his ethical and moral beliefs did not begin to take shape prior to enrollment in early 1966. However, the mistake made by the Chief of Naval Personnel was confusing this formative period with the point of crystallization, for, "it is the time of crystallization of (an individual's) beliefs that is relevant, not the dates during which these beliefs took form and shape." United States ex rel. Brown v. Resor, supra, at 1344. Even if Dr. Foster's relatively complex ethical beliefs had become "fixed" prior to his entering medical school, it could not suffice to bar his claim in 1973. It is only the objection rather than the religious belief that must manifest itself subsequent to enrollment. United States ex rel. Healy v. Beatty, supra, at 299.

Thus, in an identical case, Aron v. Laird, supra, the Court rejected the Chief of Naval Personnel's decision that a doctor's prior opposition to "war and violence" rendered him a conscientious objector. In that case, the Court of Appeals affirmed without opinion the District Court, which held:

> "The letters of recommendation do not show, as the Naval Board would have us believe, that Petitioner's views developed early in his life so that his application is untimely. The court finds that the letters show that the

> Petitioner is a sensitive, sincere, and humanistic individual who has always opposed war and violence. The fact the Petitioner did not earlier think of himself as a true conscientious objector despite his opposition to war and violence should not detract from the later crystallization of his views." Aron v. Laird, supra, 358 F. Supp. at 1174.

The recent Aron case is not unusual for other Courts have recognized that men who are opposed to war and violence because of ethical and moral reasons may not be conscientious objectors until the crystallization process occurs. Thus, the Court of Appeals in Polsky v. Wetherill, supra, set out the relation between long held "religious" thoughts and their subsequent crystallization into conscientious objection as follows:

> "It is undisputed that Polsky's religious views did not change after he entered the service, rather, his solid religious background laid the foundation for the crisis of conscience he encountered in reality when, for the first time in his life, he was faced with the actuality of violence." 455 F.2d at 961-62.

This Court only recently rejected the military's decision that a doctor was not a sincere conscientious objector although the record reflected that the Appellant "had a belief in non-violence since high school." Ferrand v. Seamans, 488 F.2d 1386, 1389 (2d Cir. 1973). Although the Ferrand case dealt

with sincerity as opposed to crystallization, the Court did not hesitate to find a complete absence of fact for the military's decision. Dr. Ferrand's pre-enrollment beliefs were no different than Dr. Foster's.

There could not be a case much closer on the facts than Aron, supra, but if there is, it is McGehee v. McKaney, 312 F. Suppl. 1372 (D. Md. 1970), in which the Army denied a conscientious objector's application for discharge because his views allegedly crystallized prior to induction. The Army quoted from a letter submitted in support of McGehee's application, which stated:

> "I have been a close friend of my [sic] Michael's for several years, during which time we have had many conversations concerning the morality of war. He has told me on several occasions that he feels war is an activity in which he could not morally participate." 312 F. Supp. at 1374.

As a basis for concluding that his conscientious objection existed prior to enlistment, the Army also cited the fact that McGehee referred to his Catholic education and the influences of his parents. The Army noted that McGehee had stated in his application "I have had these beliefs all my life. I first brought them out into the open right before I started class for Image Interpretation.

I felt that I should no longer go down the path that I was headed at this time." 312 F. Supp. at 1374. The District Court in Maryland held that these items did not provide a basis in fact to support the Army's decision and found that the Army had not actually made an effort to inquire into the time at which McGehee's objection actually became "fixed".

In Goodwin v. Laird, 317 F. Supp. 863 (N.D. Cal. 1970), the Court, faced with the same situation as that in the instant appeal, held that precisely the same reasons did not constitute a basis in fact. There the Army had cited as grounds for concluding that Goodwin had been a conscientious objector before induction his character references which pointed out his "long standing respect for life". 317 F. Supp. at 864. The Army cited the letter by Goodwin's brother, which had been submitted by Goodwin with his application, and which stated:

> "For the last several years I have discussed the various ideas involved in Will's decision to reject service in the Armed Forces: war, killing, universal brotherhood, and harmony with nature. I have always found my brother to honestly believe in the brotherhood of man, and that killing for any reason save immediate self defense, is an intolerable thing in man, a thing to fight in oneself. * * * Just prior to his entry into the Army, my brother and I discussed the idea of applying for a CO status." 317 F. Supp. at 864-65.

The Army also based its disapproval on Goodwin's statements of his religious training, and on an essay he had written on civil disobedience while in college. The Court held that none of these items constituted a basis in fact. It held that the Army had no grounds to conclude that Goodwin's conscientious objection crystallized before entry into the military.

Similarly, the Court rejected the reason given by the Army for disapproval, namely "petitioner's religious training from ages five to twelve" 317 F. Supp. at 864. The Goodwin Court demonstrated the fallaciousness of such reasoning by the military:

> "If the above contentions of the Board were true, then no person who had been brought up with a religious or anti-militarist background could apply for a conscientious objector discharge. The very facts needed to qualify a person for discharge would become the basis for a finding that his beliefs were fixed prior to entry in the service. Such a scheme cuts against the very purpose of the regulations; that is to allow the discharge of men with already existing general beliefs 'growing out of experiences prior to entering military service, but which did not become fixed until entry into the service. * * *' AR 635-20 para. 3b (Emphasis supplied)" 317 F. Supp. at 865.

Recently, in Chamoy v. Schlesinger, supra, an Air Force doctor said of his beliefs held prior to entry into the military: "I was opposed to war but my beliefs as a CO had not

yet crystallized at that time [of enrollment in the Berry Plan]."* The Court rejected the Air Force's finding of insincerity, holding that the Air Force reasoning would erroneously establish the principle "that those with conscientious objector tendencies prior to enlistment can never be adjudged sincere enough for an in-Service conscientious objector discharge." Chamoy, supra, at 687. See also Moore v. Connell, 318 F. Supp. 884 (D.Md. 1970); and Rautenstrauch v. Secretary of Defense, 313 F. Supp. 170 (W.D. Tex. 1970).

Most civilized people abhor war, and a showing that someone had strong anti-war views prior to entering the service is not a showing that he was a conscientious objector. We can only speculate on how many thousands of citizen soldiers since 1940 must have decided that their duty to state was greater than their duty to their particular conscience. Conscientious objection is an active decision that one must place his duty to conscience above his duty to the state. The process whereby one's religious and ethical beliefs manifest themselves into a resolve to resist participation in the Armed Forces has recently been referred to as crystallization.**

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* Chamoy v. Schlesinger, supra, at 688 n. 4.

** One of the earliest references to this process is found in this Court's opinion in United States v. Gearey. 363 F.2d 144 (2d Cir. 1966)

The District Court in Goodwin, supra, described this transition as follows:

> "'Crystallization' reflects a very subtle psychological process. For some persons just reading and discussing is enough to cause them to make the mental and emotional commitment to oppose participation in war. Other persons, like petitioner, need to go through the actual experience of combat training, the experience of learning to handle weapons of destruction before their beliefs crystallize into committment." 317 F. Supp. at 866.

Moreover, the process may be a gradual one, taking place over a long period. Thus, Judge Wyzanski in Silberberg v. Willis, 306 F. Supp. 1013 (D. Mass. 1969)*reasoned:

> "Unlike the authors of the regulation, the Board appears hesitant to recognize that men of the highest standard of conscientious belief may put off their final committment until necessity gives no choice. It has always been regarded as consistent with spirituality and nobility of character for men of conscientious scruples to continue to examine a moral problem until the final hour of decision, and meanwhile to reflect on their respective duties to conscience and to the social order. The delayed pronouncement of Sir Thomas Moore is often cited as an example of

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* Judge Wyzanski granted partial relief to a conscientious objector seeking discharge from the Army, and on appeal the Court of Appeals for the First Circuit reversed and granted the petitioner all the relief asked for, namely discharge. 420 F.2d 662 (1st Cir. 1970).

> how a conscientious man should act. And, indeed, this course has been recommended in a situation almost precisely parallel to Silberberg's...." 306 F. Supp. at 1021-22.

The difference between showing prior beliefs, and a "fixed" conscientious objection, was demonstrated in another, similar, case involving the Navy. In Bouthilette v. Commanding Officer, 318 F. Supp. 1143 (D.R.I. 1970), the petitioner had been denied discharge as a conscientious objector where he stated in his application, "I have always been a sincere pacifist, never believing in the use of force as a means to an end, and certainly never ever to the elimination of human life!" Bouthilette, supra, at 115. District Judge Pettine held that this statement provided no basis in fact for concluding that Bouthilette's conscientious objection had crystallized prior to enlistment in the Navy.

In summary on this point, statements about life-long pacifism, prior feelings, views and beliefs about war and violence do not show that a decision was made to choose obligations to conscience over the obligations to the state. It is not a basis in fact that the Chief of Naval Personnel can show anti-war beliefs prior to entry. There must be a basis in fact to show "crystallization," and the record here unequivocally shows crystallization in late summer of 1973. See United States ex rel. Brown v. Resor, supra; Goodwin v. Laird, supra.

(d) No Basis In Fact For Navy's Decision.

Dr. Foster's lengthy explanation of his beliefs submitted in support of his application for discharge is a critical document in deciding the issue of when his thoughts crystallized. It is the only comprehensive statement of his beliefs and their development. As his beliefs of conscientious objection are grounded in an ethical and moral code peculiar to him, it is all the more important that the document be studied carefully. Apparently both the Investigating Officer and the Chief of Naval Personnel did just that for they concede that Dr. Foster is sincere in his conscientious objection.

When the Navy agrees that Dr. Foster is sincere,they must concede that the detailed statement is truthful and not an imaginative ploy. Dr. Foster's application meticulously details the growth and maturation of his ethical and moral beliefs. This scrupulous account of a relatively young person's mental development through his personal and professional experiences is consistent with the testimony of Dr. Markowitz and the other evidence of record. An examination of that application shows that Dr. Foster's beliefs went through several stages of development. As Dr. Foster and his psychiatrist have both stated, the Appellant did have a belief that war and violence were wrong and that belief was apparently held prior to his entering medical school and the Naval Reserve in 1966. However, the application clearly shows that those beliefs

did not mature into conscientious objection until Dr. Foster had passed through medical school, internship, and finally the crystallizing events of the summer of 1973, during his residency. The Chief of Naval Personnel ignored this evidence and claimed reliance on the testimony of Dr. Markowitz. However, he failed to point to any specific portion of Dr. Markowitz's testimony to support a conclusion that Dr. Foster's dislike of war and violence had changed into a conscientious refusal to lend his medical skills to the Navy.

In fact, Dr. Markowitz's testimony offers no basis in fact for a finding that crystallization, as distinct from a general feeling of abhorrence to war, occurred prior to entry into the Navy. His testimony, if anything, was explicitly to the contrary. While he noted the long and persistent general feeling of Dr. Foster, he traced the crystallizing of his attitude to that point in the late summer of 1973 when the possibility of activation became a stark, overwhelming reality.

In that view, he is supported by the reference letters of Kenneth Gordon and petitioner's wife. Indeed, the Naval Interviewing psychiatrist who participated in the early procedural aspects relating to Dr. Foster's discharge clearly supports this conclusion. (50a).

(e) District Court Errs.

The District Court rejected Dr. Foster's arguments that his general dislike of war and violence did not amount to crystallization stating, "Dr. Foster's beliefs would seem to have progressed to a far more developed state than those of the petitioners in Goodwin and McGehee." (123a-124a). The only evidence of Dr. Foster's beliefs prior to enrollment are contained in Dr. Markowitz's testimony and the detailed application for discharge filed by Dr. Foster. All that we know from Dr. Markowitz is that his patient has long been opposed to war and violence. Foster's attitude as described by Dr. Markowitz is no different than the petitioners in Ferrand, Aron, Chamoy, Goodwin, and McGehee. The only possible distinction that the Court appears to make is the greater articulation of these views as set forth in Dr. Foster's application. Fluency of expression is not a valid ground for finding a basis in fact.

Accordingly, the decision of the District Court should be reversed on its ruling that Foster's dislike of war and violence is a basis in fact to support the Chief of Naval Personnel's decision.

Perhaps the essence of the District Court's decision is found in its summary conclusion that "much of the evidence in support of petitioner's claim of late crystallization turns on

the breakdown of his psychological defense of 'denial' of his obligation to the military." (122a). The only explanation of this cryptic dismissal of Dr. Foster's case is "[a] similar argument failed in Nurnberg where petitioner 'had the unrealistic hope that he might not be called'". (122a).

The initial error of the District Court was believing that Nurnberg v. Froehlke, supra, is a similar case. In Nurnberg the Army Hearing Officer recommended denial of Nurnberg's claim for conscientious objection "for the reason that applicant is not sincere in his beliefs." Nurnberg, 489 F.2d at 846. The Army Board also relied on Nurnberg's statement that he enlisted in the Berry Plan although he "had the unrealistic hope that [he] might not be called." Ibid.

In this context, Judge Mulligan disagreed with the District Court's characterization of the Army action:

> "The statement that the Board does not question the sincerity of petitioner's belief is somewhat ambiguous. The Board of course, concluded that Nurnberg was a conscientious objector but that he hid his beliefs in order to gain the advantage of the Berry Plan, and therefore he was not sincere in stating that he was not a conscientious objector when he enlisted in the Reserve." Nurnberg at 847.

In contrast to Nurnberg, both Commander Sweeney and the Chief of Naval Personnel did not have any reservations about

Dr. Foster's sincerity. The District Court apparently reads insincerity into Dr. Foster's application unassisted by the Naval authorities. To reach this conclusion it plucks from the transcript Dr. Markowitz's use of the technical psychological term "denial". It is difficult to analyze the significance that the District Court placed on what it considered Dr. Foster's "psychological defense of denial" as neither the petitioner nor the Government briefed it in the proceedings below. However, Dr. Markowitz's testimony indicates that he used the technical term "denial to partially explain why Dr. Foster's beliefs did not crystallize into conscientious objection until the summer of 1973.* Thus, Dr. Markowitz uses the term to explain that Dr. Foster never really considered himself a part of a military organization until the summer of 1973.

> "Of course, throughout his medical school and internship and residency he was preoccupied with so many other matters, but it wasn't, I am sure, in Dr. Foster's mind that he was in anyway connected with the Navy . . . .

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* Dr. Markowitz testified: "Now, I think that Dr. Foster got into trouble in his application as a conscientious objector partly because when he first heard that he had to go into the Navy he used a device which is familiar to psychiatrists called denial. I remember he came to my office at that time and simply mentioned to me that there was no problem, he was supposed to go in the Navy but there was some alternative, and I don't think he ever considered himself in the Navy from this time on and I never heard of it from that time on until this very time. He just pushed it out of his mind." (63a-64a).

> Since this sudden confrontation he has been very aware of the presence of the Navy . . . so it is certainly as if something has crystallized in him. It is as if where there was denial before there is now an excessive preoccupation. It is as if he has never considered himself in any imminent military situation before this time." (72a-73a).

"Denial", whatever its meaning to the District Court,was used as a technical medical term by Dr. Markowitz*, and in that sense it simply refers to a defense mechanism that operates unconsciously and is used to resolve emotional conflicts by disavowing certain thoughts or factors that are consciously intolerable.** Essentially, Dr. Markowitz explained that crystallization might have occurred sooner if Dr. Foster had had awareness of the significance of his role as a commissioned officer of the Navy. Accordingly, when Dr. Markowitz's testimony is read fairly and as a whole, it clearly shows that "denial" is used to explain a delay in crystallization of Dr. Foster's conscientious objection. Any other interpretation of this aspect of Dr. Markowitz's testimony would render his testimony inconsistent.

The only explanation of the District Court's interpretation of this limited aspect of Dr. Markowitz's testimony is that

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* (63a-64a).

** A Psychiatric Glossary, American Psychiatric Association (1969) at p. 28. Library of Congress Number 75-92048.

it is really substituting its judgment on Dr. Foster's sincerity for that of the Hearing Officer and the Chief of Naval Personnel, and this, of course, is error.

Finally, the District Court incorrectly rejected petitioner's argument that the Chief of Naval Personnel should not have reversed the decision of the Hearing Officer. Dr. Foster had argued that the Investigating Officer's decision recommending approval of Foster's application should prevent the Chief of Naval Personnel from making a de novo finding of fact on crystallization, particularly where there was nothing in the record which establishes that the views became fixed prior to entry into the service, citing McGehee v. McKaney, supra, 312 F. Supp. at 1375. The Chief of Naval Personnel's remarks were compared with the rejected conclusions in Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969).* The argument below concluded that this Circuit had indicated that a remote board of officers in Washington should not reverse a finding of the Investigating Officers, United States ex rel. Donhan v. Resor, 436 F.2d 751 (2d Cir. 1971), certainly not without hard,

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* "The mere conclusory remarks of Captain Eagen, and of others who did not personally talk with Talford, that the latter's views became fixed before entry into the service, will not suffice. Cf. United States ex rel. Tobias v. Laird, 413 F.2d 936 (4th Cir. 1969)." 306 F. Supp. at 945.

objective facts.*

The District Court rejected this argument, reasoning that the "hearing officer expressed no opinion on crystallization, but only on Dr. Foster's sincerity as to his conscientious objection." (123a). Appellant contends that the Hearing Officer's opinion reflects a clear decision that crystallization took place after enrollment. But assuming arguendo that the Hearing Officer's opinion does not reflect such a decision this Court's decision in Bolen v. Laird, 443 F.2d 457 (2d Cir. 1971) should control. Given the District Court's analysis of the Hearing Officer's opinion, the matter should have been remanded for further proceedings on this particular point for in Bolen this Court held:

> "Undisputed is petitioner's sincerity as a conscientious objector. Under the pertinent regulation, BUPERSMAN 1860120 ¶1(b), the crucial inquiry then turns to whether these views crystallize before or after entry into the service. In a careful examination of the record that was before the review board, this Court is unable to find any evidence, one way or the other, with respect to crystallization. Indeed, it appears that none of the interviewing officers,

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* Also citing: Tobias v. Laird, supra; Goodwin v. Laird, supra; Packard v. Rollins, 307 F. Supp. 1388 (W.D. Mo. 1969) aff'd, 422 F.2d 525 (8th Cir. 1970); Moore v. Connell, supra; Silberberg v. Willis, supra; Owens v. Commanding General, 307 F. Supp. 285 (N.D. Cal. 1969); Nason v. Secretary of the Army, 304 F. Supp. 422 (D. Mass. 1969)

> Including Lt. Boyd (the Investigating Officer) have directly considered this matter.
>
> The reasoning of the Chief of Naval Personnel is, under these circumstances legally insufficient to constitute a basis in fact." Bolen, supra, at 460.*

(f) Standard of Review.

> The District Court below ruled:
>
> "The only issue then is whether or not there is some evidence in the record which would support a finding that petitioner's conscientious objection crystallized prior to his enrolling in the Ensign 1915 Program since it was the finding on which the Chief of Naval Personnel based his denial of a discharge to Dr. Foster." (120a)

The Court concluded that "'an objective basis' for disbelieving the applicant must amount to more than a mere scintilla of the evidence, however, the evidence need not preponderate." (121a). It is submitted that the District Court did not correctly apply the standard of review as articulated by this Court.

The courts have long applied the "basis in fact" test

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* Despite the District Court's analysis, Appellant contends the only distinction discernible between Bolen and Foster is that here the record contains precise and uncontradicted testimony that crystallization occurred long after entry into the Navy.

originally set forth in Estep v. United States* to claims of conscientious objection by personnel in the military and naval services. See e.g. Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968). However, extensive litigation in recent years has added an important judicial gloss to the Estep doctrine. Thus, in United States ex rel. Checkman v. Laird, 469 F.2d 773 (2d. Cir. 1971), this Court after noting the test was intended to limit the freedom of a court to substitute its judgment for that of an official agency or board held that "objective evidence" of record must support the specific reasons for the denial of the military authorities. Checkman, supra, at 787. Similarly, this Court in Bolen v. Laird, supra, held that the Navy's decision must be supported by "some logical factual support in the record". Bolen at 460.

Thus in cases similar to the instant one, more than the vague "some evidence" is required to support the denial by the military or naval authorities and it is now well established that these decisions must be supported by logical and factual evidence that reasonably supports the decisions under review. A judicial search of the administrative record for "some evidence" is not the standard developed by this Court.

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* In Estep v. United States, 327 U.S. 114 (1946), the Supreme Court was balancing the requirements of due process against an express Congressional limitation of judicial review motivated in part by a concern for the orderly flow of recruits for a nation at war.

In the instant case the District Court searched through the record to find its own reason to support the decision of the Chief of Naval Personnel. In essence the District Court finds that Dr. Foster was not sincere, stating that "much of the evidence in support of petitioner's claim of late crystallization turns on the breakdown of his psychological defense of his 'denial' of his obligation to the military." Thus, the District Court made the mistake of analogizing Dr. Foster's position as that of Dr. Nurnberg.* However, as we have indicated, the military in Nurnberg had found that the applicant was insincere. Here, not only the Investigating Officer but the Chief of Naval Personnel have concluded that Dr. Foster is entirely sincere. In short, the District Court has simply found a reason to deny Dr. Foster's application, which was not relied upon by the military. Moreover, the reason relied upon by the District Court is not supported by any evidence in the record. Thus, the District Court's review is contrary to this Court's rulings in Checkman, Bolen and Nurnberg.

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* The Nurnberg case despite some superficial similarity is completely distinguishable. In that case there was ample evidence that Nurnberg's conscientious objection or inability to serve had become fixed prior to enrollment.

POINT II.

THE FAILURE OF THE APPLICANT'S COMMANDING OFFICER TO SUBMIT A RECOMMENDATION AND OTHERWISE CARRY OUT HIS DUTIES VIOLATED THE NAVY'S REGULATIONS.

This Court has stated on numerous occasions that although it is reluctant to interfere with the operation of the military, it will insist that regulations once issued by the military must be scrupulously followed. Hammond v. Lenfest, 398 F.2d 705, 708 (2nd Cir. 1968). The Government has conceded that "the Commander, Third Naval District, Lieutenant Foster's superior did not make a recommendation as to his application, as required by Navy Regulations". (See pages 23-24 of the Governments' Memorandum of Law, submitted to the District Court). In fact, Dr. Foster's commanding officer completely ignored the applicable Regulation, 32 C.F.R. § 730.18(k)*. That Regulation provides in pertinent part:

> "(k) The commanding officer shall review the record of the case for completeness and may return it to the investigating officer for further investigation. When the record is complete, the commanding officer shall forward it with his personal

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* Although appellant did not argue this issue before the District Court, it was clearly before the District Court as it was set out in the Government's brief. As the District Court's decision makes the procedures in subparagraph (k) critical, and the facts are not in dispute, this Court should consider this issue on appeal although not fully briefed below.

> recommendations and the reasons therefor to the Chief of Naval Personnel for final action . . . . The commanding officer's forwarding endorsement shall include the applicant's rebuttal to the record, if any."

Thus we see that the commanding officer must initially review the record of the case for completeness, and a fair reading of the Regulation is that he will return it to the investigating officer for further investigation, if it is incomplete. The Regulation further provides that the completed record shall be forwarded to the Chief of Naval Personnel by the commanding officer "with his personal recommendations and the reasons therefor". Moreover, the Regulation also provides that the commanding officer's forwarding endorsement shall include the applicant's rebuttal to the record.

In this case the record was simply forwarded to the Chief of Naval Personnel without the commanding officer's recommendations and reasons. (96a). We can only presume that the commanding officer did review the record and found it to be complete.

In the Court below, the Government argued that the Commanding Officer's failure was a harmless oversight, contending that there was a basis in fact for the Chief of Naval Personnel's decision and that the Commandant did not personally know the applicant. These facile arguments overlook the substantial advantages

that would inure to the applicant from the proper action of the Commandant.

Initially, the commanding officer has the responsibility of returning the record to the investigating officer if he deems the record incomplete. The District Court has found that the record was incomplete as the hearing officer did not make a specific finding as to the date of crystallization. (123a). Indeed, the District Court essentially discounts the detailed findings of the investigating officer because of this lack of completeness. Accordingly, the appellant would not have been confronted with this aspect of the decision if the Navy had complied with its regulations as it is clear from the transcript of the hearing that Commander Sweeney, the Investigating Officer, would have made a specific finding with respect to the time of crystallization and that point of time would have been subsequent to enrollment in the Naval Reserve. Moreover, if for some reason the point of crystallization had not actually been considered by the Investigating Officer, then the record could have been reopened so that additional evidence directed specifically to this point could have been introduced at the hearing level. This would have eliminated the Chief of Naval Personnel's speculation.

Of course, another substantial advantage to the applicant from adherance to proper regulatory procedure could have been

the favorable recommendation and reasoning of the Commandant. In this regard although the Chief of Naval Personnel may have final responsibility pursuant to the regulatory scheme, he has no special expertise in deciding the point at which a man's conscience requires him to resist naval authority, and moreover, he cannot disregard the opinions and findings of his subordinates, appointed by him to make such findings. Certainly, whatever the recommendation and reasoning of the Commanding Officer might have been, his reasoning would have been helpful in the review of the Navy's decisions.

The Government's arguments have previously been rejected by this Court. Thus in Friedberg v. Resor, 453 F.2d 935 (2nd Cir. 1971), the Army had failed to afford the applicant certain procedural rights and the Government argued that there was a basis in fact for the Army's decision in denying the application of Dr. Friedberg for discharge as a conscientious objector. This Court declined to review the decision for a basis in fact holding when military "regulations prescribe specific steps to be taken to insure due process they must be substantially observed". Friedberg at 938. This Court rejected arguments similar to ones made by the Government before Judge Duffy and further held:

> "Because of its failure to follow the procedures specifically set forth in the applicable regulations, the Review Board's decision cannot stand the test of military due process of which the courts are the final guardian". Ibid.

In Friedberg this Court did not sanction the commanding officer's failure to scrupulously observe procedural requirements. However, in an earlier case, United States ex rel. Donham v. Resor, 436 F.2d 751 (2nd Cir. 1971), this Court considered the failure of a commanding officer of an applicant to make the appropriate recommendation to his superior. The Government argued below that the failure of the Commandant to submit a recommendation was harmless error as the Commandant did not personally know the applicant as did the commanding officer in Donham v. Resor. Although Donham does indicate that one of the reasons for requiring the commanding officer to make a recommendation is to obtain an opinion of an officer who has personal knowledge of the applicant that certainly is not the only purpose of the Regulation. For example, it is undoubtedly important for a person exercising command over a certain group of military personnel to assist the final authority with the benefit of his opinion. Certainly the clear holding in Donham v. Resor is that the failure of a commanding officer to make such recommendations is an error which requires, at the very least, remanding the matter back to the military.* Accordingly, we see that the failure of the military to follow its

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* Appellant contends that remand is not necessary because Commander Sweeney's opinion, and the evidence of record, clearly show crystallization in 1973. However, if it is determined that the record lacks evidence as to the specific time of crystallization then a remand would be proper.

regulations denies the applicant substantial procedural rights.

Finally, this Court has held that it will not overlook these procedural rights on the theory that there may be a basis in fact for the military's decision. The very narrowness of review in this case mandates that the applicant be afforded his procedural rights.

III.

THE NAVY FAILED TO ADHERE TO ITS REGULATIONS IN DENYING APPELLANT'S APPLICATION AS HE COULD NOT HAVE QUALIFIED AS A CONSCIENTIOUS OBJECTOR AT THE TIME OF HIS ENROLLMENT IN THE NAVAL RESERVE.

The Chief of Naval Personnel essentially denied Dr. Foster's application by determining that Dr. Foster's beliefs at the time of his enrollment in 1966 "satisfied the requirements for classification as a conscientious objector pursuant to Section 6(j) of the Universal Military Training and Service Act ."* The Chief of Naval Personnel's decision is erroneous because even accepting the Navy's finding that his beliefs became fixed in 1966, Dr. Foster could not have qualified as a conscientious objector in 1966 under the then prevailing interpretation of the statute.

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* 32 C.F.R. § 730.18.

United States v. Fargnoli, 458 F.2d 1237 (1st Cir. 1972).* Accordingly, if this Court determines that a basis in fact exists to support the Navy's conclusion, then this Court must consider whether Dr. Foster's beliefs would have satisfied the requirements of the Universal Military Training and Service Act as interpreted by the Selective Service System and the Courts in 1966.

This argument was not raised below.** Nevertheless, this Court should consider this argument at this time as it only presents a question of law. Foster v. United States, 329 F.2d 717, 718 (2nd Cir. 1964), and no factual development is necessary. Terkildsen v. Waters, 481 F.2d 201 (2nd Cir. 1973). Most importantly, special circumstances exist in light of a strong national policy to exempt sincere conscientious objectors from military service that mandates such present consideration. United States v. L. N. White and Company, 359 F.2d 703, 711-712 (2nd Cir. 1966).

It is difficult, at best, to characterize Dr. Foster's beliefs prior to his enrollment in the Reserve of the Navy because

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* But see United States v. Hoffman, 488 F.2d 923 (5th Cir. 1974) and cases cited therein.

** This argument was not raised at the administrative level as the Hearing Officer's decision was that Dr. Foster qualified as a conscientious objector, nor was it raised at the intermediate level as the Commandant or the Third Naval District did not make any decision whatsoever, and of course, there was no opportunity or necessity for this point to be raised before the Chief of Naval Personnel.

his beliefs were still in the formative stage in 1966. Nevertheless, it is clear that whatever beliefs he had were based on "natural law" and, as Dr. Markowitz testified, were ethical and moral as opposed to religious. Indeed, as late as the Spring of 1973, the Naval Chaplain characterizes his beliefs as "a rare, personal moral code". (52a). It is clear that his beliefs were not religious in the traditional sense and the Investigating Officer characterized them as "ethical".* (94a).

Shortly before Dr. Foster enrolled in the Naval Reserve, the Supreme Court construed Section 6(j) of the Universal Military Training and Service Act** in United States v. Seeger

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* Although portions of Dr. Foster's testimony before the Hearing Officer may sound religious as he describes his beliefs in terms of a supreme force or a primary force, it is clear from the remaining context that he is referring to an evolutionary force of natural evolution and not to a religious concept. In fact, Commander Sweeney acknowledged this by his preceding question concerning the source of Dr. Foster's beliefs in a "natural evolution". (82a).

** 62 Stat 612, 50 U.S.C. App. § 456(j):

> "...Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Congress amended this section in 1967 by deleting the reference to a "Supreme Being" but continued to rpovide that "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a merely personal moral code." 81 Stat. 104, 50 U.S.C. App. § 456(j)(1964 ed., Supp. IV).

380 U.S. 163 (1965). There the Court in examining the provision of that statute that limited conscientious objection to claims stemming from a belief in "a Supreme Being", ruled that the word "Supreme Being" was used by Congress to classify the meaning of religious training and belief so as to include all religions but to exclude essentially political, sociological or philosophical views.

The test set forth in Seeger was does the "claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" Seeger, 380 U.S. at 184. However, the Court carefully noted that "merely a personal moral code" would not exempt an objector. Seeger, at 185. Accordingly, Dr. Foster would not have been qualified as a conscientious objector if he had applied for such status in 1966.

The regulations of the Selective Service System after Seeger and prior to the decision in Welsh v. United States, 398 U.S. 333 (1970), clearly would have prohibited Dr. Foster's claim. Thus, in United States v. Forgnoli, supra, the Court held that the decision in Welsh was not a mere reiteration of Seeger, and this view was reflected in the applicable Selective Service regulations.

The Forgnoli Court noted that the Selective Service System regulations prior to Welsh provided:

> "To be entitled to a classification as a conscientious objector, the registrant's objection to military service must be by reason of religious training and belief. The definition of 'religious training and belief' comports with a standard or accepted understanding of the meaning of religion in American society . . . . However, the use of the word ['religion'] in connection with the selective service law was not intended to be inclusive of morals, or of devotion to human welfare or of policy of government . . . . [Footnote omitted.] L. Hershey, D. Omer & E. Denny, Legal Aspects of Selective Service 12 (1969 ed.) (manual for government appeal agents).
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> On July 6, 1970, shortly after Welsh was decided, the Selective Service System issued Local Board Memorandum No. 107, which stated in part that
>
> > 'The term 'religious training and belief' as used in the law may include solely moral or ethical beliefs, even though the registrant himself may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not 'religious'." United States v. Forgnoli, supra, at 1239.

The First Circuit concluded: "The contrast between the two statements is striking -- the former is a begrudging version of Seeger, while the latter is a straightforward acceptance in ordinary language of Welsh." Ibid.

In fact it was not until the Supreme Court some 5 years after Seeger, decided Welsh v. United States, that Selective Service Systems were forced to entertain claims of conscience objection

based on purely ethical and moral codes. For in the Welsh case, Mr. Justice Black enunciated a new rule:

> "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by * * * God' in traditionally religious persons." Welsh, 398 U.S. at 340.

Thus we see that despite the liberalizing interpretation of Section 6(j) by the Seeger Court, it took another five years for the country to recognize that Section 6(j) also included purely ethical and moral beliefs such as those held by Dr. Foster.

Even if it is assumed arguendo that Dr. Foster's beliefs had not changed since his college days, we would be forced to conclude that if he had applied to the Selective Service System for deferment as a conscientious objector at that time, he would have had his application denied. Moreover, even judicial review would not have afforded him relief as it took the Supreme Court to do that in 1970.

Accordingly, if there is a basis in fact to support the Chief of Naval Personnel's conclusion that Dr. Foster's beliefs were fixed prior to enrollment, he would still be entitled to a discharge under the applicable Regulation.

CONCLUSION

The decision of the District Court should be reversed and the Writ of Habeas Corpus should issue.

Respectfully submitted

DANIEL RIESEL
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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURT OF APPEALS: SECOND CIRCUIT

US,

Petitioner-Appellant,

against

SCHLESINGER, ET AL,
Respondent-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 17th day of December 1974 at Foley Square, New York

deponent served the annexed Brief upon

Paul Curran

the in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 17th day of December 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975